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NOTES OF RECENT CASES.

Bell, J. President, Hindu Religious Endowments Board, Madras *v.* Srinivasa Iyengar.
16th March, 1945. C. R. P. No. 1416 of 1944.

Hindu Religious Endowments Act (II of 1927), *section* 84 (2)—*Application under to set aside or modify a decision of the Board—Nature of—Limitation Act (IX of* 1908), *section* 12 (2)—*Applicability—Time taken for obtaining copy of Board's decision—Can be excluded in computing limitation for such application.*

An application under section 84 (2) of the Hindu Religious Endowments Act made to the Court to modify or set aside a decision of the Board is an appeal to which section 12 (2) of the Limitation Act applies. Accordingly the time requisite for obtaining a copy of the decision of the Board must be excluded from the period of one year provided by section 84 (2) of the Hindu Religious Endowments Act for such an application.

The Advocate-General (*P. V. Rajamannar*) and *M. Chockalingam* for Petitioner.

T. V. Ramanatha Aiyar for Respondent.

K.S.

Wadsworth, J. Moidin Kutti *v.* Narayana Unni Moopil Nayar.
10th April, 1945. A. A. O. No. 247 of 1944.

Madras Agriculturists' Relief Act (IV of 1938), *section* 19—*Compromise decrees—Scaling down—Principles.*

In a suit filed in 1932 for Rs. 3,000 due on a mortgage executed for Rs. 1,600 in 1922, a compromise decree was passed on 21st July, 1933, providing that the plaintiff would give up the whole amount of the suit claim and Court costs except for Rs. 2,500. If the defendant paid before a certain date the plaintiff would give up a further sum of Rs. 500. Failing that, the whole amount of Rs. 2,500 would be realised by the sale of the properties in the plaint schedule. On an application to scale down the compromise decree,

Held, that it is incumbent upon the debtor to prove the extent to which interest is available for cancellation and the extent to which the compromise figure can be deemed to be a renewal of the antecedent liability. In the absence of any waiver by the mortgagee of his claim for costs, the judgment-debtors cannot say that the compromise figure is a renewal of the antecedent liability to the extent of the amount of costs (about Rs. 500). The balance of the amount decreed must necessarily have been made up of the principal and interest of the mortgage debt and the debtor is entitled to the scaling down and amendment of the decree so as to provide for the payment of Rs. 1,600 with interest thereon at 5 per cent. from 1st October, 1937, and for Rs. 500 being the amount of costs with interest thereon at 5 per cent. from the date of the decree 21st July, 1933 to 22nd March, 1938, the date of the commencement of the Act and thereafter at 6 per cent.

Judgments in A. A. O. No. 491 of 1939 and C. R. P. No. 2316 of 1939, applied. Judgment in A. S. No. 235 of 1941, distinguished.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondent.

K.S.

Bell, J. Sriramamurti *v.* Sanyasi Raju.
20th April, 1945. C. R. P. No. 882 of 1944.

Civil Procedure Code (V of 1908), *Order* 33, *rule* 5 (d1)—*Question as to age of pauper petitioner for deciding whether suit was barred by limitation—Power of Court to hear evidence and decide.*

Different considerations apply under the new sub-rule (*d*-1) of Order 33, rule 5, to those which apply under sub-rule (*d*). Whether the allegations in an application for leave to sue as a pauper do or do not show a cause of action is a question quite different from the question whether the suit appears to be barred by limitation. Accordingly there is no bar to the hearing of evidence as to the date of birth of the applicant for deciding whether the suit was barred by limitation.

(1941) 1 M.L.J. 31, distinguished.

G. Chandrasekhara Sastri for Petitioner.

B. V. Subrahmanyam and *P. Satyanarayana Rao* for Respondent.

K.S.

Bell, J. — Venkatachala Pillai *v.* Rajagopal Naidu.

20th April, 1945. — C. R. P. No. 1573 of 1944.

Transfer of Property Act (IV of 1882), section 100—Charge brought into being by a decree of Court—If one brought into existence by " operation of law."

Under section 100 of the Transfer of Property Act, a charge must be brought into existence either by act of parties or by operation of law. The words " by operation of law " do include a charge brought into being by a decree of a competent Court.

A.I.R. 1943 Oudh 354 (F.B.) and A.I.R. 1943 Bom. 414, followed. I.L.R. (1941) Nag. 513 ; A.I.R. 1940 Nag. 163, dissented from.

N. Panchapagesa Aiyar for Petitioner.

L. V. Krishnaswami Aiyar for Respondent.

K.S.

Somayya, J. — Valliammal Ammal *v.* Ramaswami Naidu.

20th April, 1945. — S. A. No. 1616 of 1944.

Succession certificate—Grant of—Effect—Entitles holder only to sue for a debt and not to assign the debt.

The grant of a succession certificate only clothes the grantee with a right to sue for a debt due to the deceased and that right cannot be transferred. The holder of the certificate has no right to assign a mortgage debt or effect a sub-mortgage of it.

[I.L.R. 35 All. 74 and I.L.R. 36 All. 21, relied on. Observations in (1943) 2 M.L.J. 201 held to be *obiter* and not followed.] Leave to appeal granted.

T. S. Vaidyanatha Aiyar for Appellant.

K. V. Srinivasa Aiyar and *N. C. Raghavachari* for Respondents.

K.S.

Kuppuswami Ayyar, J. — Linga, *In re.*

27th April, 1945. — Crl. R. C. No. 169 of 1945.

Criminal Trial—Rioting and causing hurt during the course of rioting—Separate sentences—Legality—Sentences if can run consecutively.

Where the accused persons have been convicted for rioting and also for causing hurt during the course of the rioting there is no bar to the passing of separate sentences in respect of each of those offences. But as it is only the fact that injury was caused that constituted rioting and since the same set of facts constituted both offences it is but proper that the sentences should be directed to run concurrently and not consecutively.

V. T. Rangaswami Aiyangar and *N. C. Raghavachari* for first Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Clarke, J. — S. S. Vasan, *In re.*

26th June, 1945. — Crl. R. C. No. 356 of 1945.
(Crl. R. P. No. 332 of 1945).

Newsprint Control Order (1941), *clause* 3 (6) *and Defence of India Rules* (1939), *rule* 81 (4)*—Use of paper other than newsprint for production of annual supplement to a weekly—How far an offence.*

The proprietor and editor of a weekly was prosecuted for an offence under rule 81 (4) of the Defence of India Rules read with clause 3 (6) of the Newsprint Control Order, 1941, for using paper other than newsprint for the production of an annual supplement issued at Deepavali in the year 1944.

Sub-clause (6) of section 3 of the Newsprint Control Order prohibits the proprietor of a newspaper from using in the printing of his " newspaper " any kind of paper other than newsprint. It was contended for the prosecution that the explanation to sub-clause (5) which includes a supplement or annual edition in the definition of a " newspaper " was applicable to sub-clause (6) also and therefore the supplement was a " newspaper."

Held, the supplement issued on the occasion of an annual festival whilst it may well have contained comments on the news for the past year cannot ordinarily be regarded as a newspaper on that account. Nor does the supplement fall within the definition of a " newspaper " in the Newspaper Control Order, 1944, as it was not a " periodical publication printed on newsprint." In the absence of an explanation to sub-clause (6) of clause 3 of the Newsprint Control Order similar to the explanation to sub-clause (5) the supplement cannot be regarded as a "newspaper" so as to make the use of paper other than newsprint in producing it an offence.

V. C. Gopalaratnam and *B. T. Sundararajan* for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Chandrasekhara Ayyar, J. Mohammed Hussain *v.* Official Receiver, West Godavari.
9th July, 1945. C. R. P. No. 733 of 1944.

Provincial Insolvency Act (V of 1920), section 4—Scope—Complicated questions of title—Jurisdiction to go into.

Although the Insolvency Court can decline to adjudicate on questions of title or property under section 4 of the Provincial Insolvency Act on the ground of their being complicated there is nothing to prevent the Court from deciding applications under section 4.

K. Mangachari for Petitioner.

E. Venkatesan for Respondent.

K.S.

Happell, J. Public Prosecutor, Madras *v.* Venkatanarayana.
10th July, 1945. Crl. App. No. 143 of 1945.

Hoarding and Profiteering Prevention Ordinance (XXXV of 1943), section 6 (2) (b) (ii)—Construction—Sale price with 20 per cent. over cost price—Freight charges cannot be included.

For the purpose of calculating whether the price at which a dealer accused under the Hoarding and Profiteering Prevention Ordinance had sold articles was within the 20 per cent. addition to the price at which the producer had sold the article to him, it is not open to him to add to the price at which the producer sold the article the expenses incurred by him such as freight, forwarding charges and so forth. The cost of the article to the dealer is not the governing factor.

The Public Prosecutor (*V. L. Ethiraj*) Appellant.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondents.

K.S.

Chandrasekhara Ayyar, J. Mahabub Sahib *v.* Sisidheswaraswami Temple.
10th July, 1945. S. A. No. 394 of 1943.

Public way—Newly erected mosque on it—Agreement at time of erecting mosque by all the then Muhammadan residents of the village not to object to processions by Hindus with music opposite the mosque—Muhammadan community how far bound—Penal Code (XLV of 1860), section 296—Gist of offence under.

A new mosque had come into existence somewhere about 1904 or 1905, and permission was given to the Muhammadans of the village, who wanted to have that mosque erected, to construct it on a particular site, despite objections raised by the Hindus, and on the undertaking given by all the then Muhammadan residents of the place that there shall be no obstruction raised by them to music being played on the High Road in connection with private or temple processions. In a suit by the Hindu residents of the village for declaration of their right to pass along the particular public road in procession to the accompaniment of music, it was contended that the undertaking was not binding against the Muhammadan community and that it was not open to a few Muhammadans however influential, or even to all the Muhammadan residents of a particular place or locality to enter into an agreement of that kind.

Held, that the agreement was binding on the Muhammadan community.

Mere playing music before a mosque cannot amount to an offence under section 296 of the Penal Code though a deliberate intention to disturb may not be necessary. Before that section could apply it must be found as a fact that there was a substantial and not merely fanciful disturbance of the worship. Accordingly the Hindus' right cannot be declared subject to a condition requiring them to stop playing in the processions musical accompaniments within the limits of one chain on either side of the mosque compound at the five times of the public congregational prayers in the mosque.

(1938) 2 M.L.J. 165, distinguished.

B. Pocker and *A. M. Allapichai* for Appellants.

A. Bhujanga Rao, R. Krishna Sastri and *D. R. Krishna Rao* for Respondents.

K.S.

Mockett and Bell, JJ. Chinna Obigadu, *In re.*
18th July, 1945. R. T. No. 88 of 1945.

Criminal Procedure Code (V of 1898), S. 102—Constable searching house after pursuing into it a person who had just committed a murder—If bound to search himself and persons going into the house with him.

A person who had just committed a murder had run into his house and bolted himself in. There was an outcry and various people including a constable gathered. The crowd closed the house to prevent the accused from coming out but when he was challenged by the constable he did come out. In the house were found blood-stained clothes and a blood-stained dagger.

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In cross-examination the constable said that he did not observe the provisions as to house-searches and did not search himself or the panchayatdars before going into the house to search,

Held, section 102 of the Criminal Procedure Code relates only to formal searches under search warrants issued under sections 96 or 98. In an emergency such as the one in the case when the police are not going in for the purpose of a search for any specified object but for a general investigation there is no provision of the Criminal Procedure Code which imposes on them the duty of searching respectable citizens or themselves before the public. Whether as a matter of convention these things may be done in order to remove any cause for subsequent criticism is another matter.

G. Gopalaswami for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. Ramakrishna Doss, *In re.*
19th July, 1945. Crl. R. C. No. 139 of 1945.
(Crl. R. P. No. 133 of 1945).

Defence of India Rules (1939)—Notification under issued on 20th April, 1943, prohibiting transport of chillies from any place in the Madras Province to any place outside the province without permit—Transport from enclave villages of Travancore State to Travancore proper through Madras territory—If transport from Madras—Road through Madras territory maintained by Travancore State—If Madras territory.

The Madras notification issued on 20th April, 1943, under the powers conferred by the Central Government under the Defence of India Rules prohibited the transport of chillies from any place in the Province of Madras to any place in India outside the province except under and in accordance with the terms and conditions of a permit.

In a prosecution in respect of an attempt to transport chillies without permit from the Travancore enclave villages (villages entirely surrounded by British territory and cut off from the Travancore State) to the Travancore State,

Held, that if goods are taken through the Province of Madras to a place outside the Province even though they originated elsewhere, they are taken from a place in Madras to a place outside the Province within the meaning of the notification. Once the prohibited goods have entered the Province of Madras, they cannot be taken out without a permit. It cannot be said that in effect the transport of chillies will be from one part of Travancore State to another since the road between the enclave villages and Travancore territory over which the chillies were transported is maintained by the Travancore Government. The road none-the-less is Madras territory and consequently the chillies were transported from a place in Madras to a place in Travancore territory so as to attract the notification.

Roland Braddell and *K. V. Ramaseshan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. Haridayal, *In re.*
27th July, 1945. Cr. A. No. 76 of 1945.

Hoarding and Profiteering Prevention Ordinance—(XXXV of 1943), section 6 (1)—Prosecution of retail dealer for offence under—Cost of production of the article concerned—Failure of prosecution to prove—Effect—Absence of any objection at the trial on that ground and basis favourable to accused at cost to him adopted—Conviction if to be interfered with on appeal.

It cannot be said that a prosecution under section 6 (1) of the Hoarding and Profiteering Prevention Ordinance must fail unless the cost of production of the article concerned is proved.

Jebb v. *Emperor*, unreported decision of the Calcutta High Court distinguished.

Where at the trial on a charge under the Hoarding and Profiteering Prevention Ordinance of selling an article for a consideration which was unreasonable no objection was taken to the basis for calculation adopted for testing the price, namely, the cost to the retailer which was certainly above the cost of production, that basis being *prima facie* more favourable to the accused, there is no sufficient justification for interfering with the conviction of the accused on appeal.

V. L. Ethiraj (The Public Prosecutor) and *A. S. Sivakaminathan* (The Assistant Public Prosecutor) for the Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Shahab-ud-din, J. — Sankaran Nambiar v. Kottayam Bank.
13th July, 1945. — C. R. P. No. 317 of 1945.

Companies Act (VII of 1913), section 235—Proceedings under against directors—Death of one of them during the enquiry—Proceedings cannot be continued against his heirs.

Where during the enquiry of proceedings commenced under section 235 of the Companies Act against the directors of a company one of the directors died, the application cannot be continued against his heirs as representing his estate. I.L.R. (1939) All. 6 and I.L.R. (1944) Bom. 84, relied on. Section 198 of the Companies Act only deals with the powers of the Court with regard to the estate of a contributory or a debtor and that power cannot be exercised in summary proceedings under section 235. Order 22, rule 4 of the Code of Civil Procedure applies only where the right to sue survives and is not applicable to proceedings under section 235 of the Companies Act, the right to continue which does not survive the death of a respondent.

S. Venkatachala Sastri for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Paparao v. Polnaidu.
18th July, 1945. — S. A. No. 1423 of 1943.

Sale of land—Express covenant for title and for freedom from encumbrances—Is a term of contract—Oral evidence to show that purchase was subject to any encumbrance—Not admissible—Evidence Act (I of 1872) section 92—Damages for breach of covenant—Measure of.

An express covenant for title or for freedom from encumbrance in a sale of land, cannot be regarded as a mere recital which can be contradicted by oral evidence. Such covenants are terms of the contract itself, and any oral evidence to contradict them falls within the mischief of section 92 of the Evidence Act. A.I.R. 1925 Mad. 968, dissented from.

The measure of damages which the vendee is entitled to is only the amount by which the existence of the encumbrance can be said to have diminished the value of the property and not the value of the land unless there has been any eviction of the purchaser from the land itself.

V. Govindarajachari and *E. Venkatesam* for Appellants.

V. Parthasarathy for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Pitchamma v. Rosamma.
26th July, 1945. — S. A. No. 1409 of 1944.

Practice—First appeal—Confirming judgment—Proper form.

A confirming judgment may be brief, but it cannot be a blank. It is the obligation of the appellate Judge to deal with the various arguments urged by the appellant against the conclusion of the trial Court and to give his reasons for repelling those arguments if he was of the opinion that they should be so rejected. Merely to say that the Munsiff's view is sound on the evidence is not to give any indication that the appellate Judge has applied his own mind to the questions at issue between the parties.

K. Umamaheswaram and *P. R. Ramachandra Rao* for Appellant.

B. V. Ramanarasu and *N. Kotiswara Rao* for Respondent.

K.S.

Kuppuswami Ayyar, J. — Bhupathiraju Ramaraju, *In re.*
26th July, 1945. — Crl. R. C. No. 408 of 1945.
(Case Refd. No. 6 of 1945).

Evidence Act (I of 1872), section 114—Possession of stolen property by a born deaf and dumb person—Impossibility of making him understand what he was asked and absence of any attempt to find if he could give an explanation—Inference under section 114 Evidence Act as to theft by him cannot be drawn.

An inference under section 114 of the Evidence Act that a person in possession of stolen property shortly thereafter committed the offence of housebreaking or theft could be drawn only if he is not able to explain his possession of such property. Where however it is not possible to communicate with such person because he was born deaf and dumb and no attempt was made to make him explain the possession, the inference cannot be drawn. It is only if an explanation is called for and he fails to give a satisfactory one, such a presumption could be drawn.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

Rajamannar, J. — Poliah v. Muniswami Chetty.
27th July, 1945. — C. R. P. No. 1222 of 1944.

Madras Debt Conciliation Act (XI of 1936), section 10 (3)—"Civil Court" before which creditor whose debt has been declared discharged under section 10 (1) may file application for revival of his debt—Should be one having pecuniary as well as territorial jurisdiction as regards the debt sought to be revived.

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The "Civil Court" contemplated in sub-section (3) of section 10 of the Madras Debt Conciliation Act before which a creditor may file an application for revival of his debt (which had been declared discharged under sub-section (1) of that section) is the Civil Court which would be competent to entertain a suit for the recovery of the debt sought to be recovered. Consequently a District Munsiff would not be competent to entertain an application for revival of a debt amounting to more than Rs. 3,000 on the date of the application to the Debt Conciliation Board. The Court should be possessed of not only territorial but also of pecuniary jurisdiction.

K. Umamaheswaram for Petitioner.

K. Krishnamurthi for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Foulkes *v.* Salem Municipal Council.

30th July, 1945. — S. A. No. 1632 of 1944.

Madras District Municipalities Act (V of 1920), section 81 (4) (*b*)—*Assessment to property tax—Person owning only "melwaram" rights in agricultural land—Liability of.*

Under section 81 (4) of the Madras District Municipalities Act, a person owning property is liable to assessment of property tax and it is not necessary that he should own the entire interest in agricultural land. Accordingly a person having only the melwaram right cannot escape assessment on the ground that the lands are in the possession of occupancy ryots.

M. Sundaram for Appellant.

K. Subba Rao for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Ranganayaki Ammal *v.* Chellammal.

31st July, 1945. — S. A. No. 1733 of 1944.

Limitation Act (IX of 1908), Article 61—Next friend of lunatic incurring expenses in suing for reducing the lunatic's estate to possession—Wife of lunatic appointed manager of his estate—Subsequent removal of next friend and substitution of the wife and another as next friend—Claim for recovery of expenses incurred in the suit by first next friend—Limitation—Starting point.

The sister of a lunatic filed a suit as his next friend to recover certain properties in the hands of third parties. The preliminary decree was passed on 5th December, 1931, and it was confirmed on appeal on 1st October, 1937. The final decree was made on 1st November, 1940. Meantime the lunatic's wife successfully applied to be appointed the manager of the lunatic's estate. The order appointing the wife as manager was made on 19th April, 1934, and confirmed on appeal on 22nd July, 1937. Thereupon, the wife applied on 10th December, 1937, for removal of the sister from her place as next friend of the lunatic and for the substitution of herself and another person in her place. The order allowing the application was made on 25th November, 1938. The sister then filed a suit on 18th November, 1941 to recover moneys that she spent in the suit filed by her as next friend and connected proceedings:

Held, the suit was within limitation having been brought within three years from the order removing the plaintiff from her place as next friend. The appointment of the wife as manager did not by itself operate as a removal of the sister from her position as next friend. There must be an actual removal ordered by the Court before a next friend can terminate his or her connection with the suit and the cause of action for recovering the moneys spent in that suit by the next friend arises only on her removal.

B. Manavala Chowdari and *T. K. Subramania Pillai* for Appellant.

C. Narasimhachari and *M. E. Rajagopalachari* for Respondent.

K.S.

Kuppuswami Ayyar, J. — Labhar *alias* Sheck Abdul Khadir, *In re.*

3rd August, 1945. — Cr. R. C. No. 434 of 1945.

(Crl. R. P. No. 398 of 1945).

Criminal Procedure Code (V of 1898), section 196-A—*Conspiracy to export gold from British India in contravention of rule* 90-B *of the Defence of India Rules—Prosecution for—Does not require sanction under section* 196-A, *Criminal Procedure Code.*

A conspiracy to export gold from British India in contravention of rule 90-B of the Defence of India Rules is one to commit a cognizable offence in respect of which the offender is liable to receive a sentence of 5 years rigorous imprisonment. Consequently section 196-A, Criminal Procedure Code does not necessitate a previous sanction.

The substitution in March, 1941, of the present sub-rule 3 to rule 90-B of the Defence of India Rules merely enabled those who contravened the rule the benefit of being dealt with under the Sea Customs Act, 1878. But at the same time the Amendment retained the punishment for such offences in cases where the Collector thought that the benefits of the Sea Customs Act ought not to be given to a particular offender or a particular offence; and in that case the punishment of 5 years rigorous imprisonment was retained.

V. V. Srinivasa Aiyangar, K. Bashyam, T. R. Srinivasan and *R. Desikan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Bhagwat Shukul *v.* Mt. Kaporni, (1944) I.L.R. 23 Pat. 599 (F.B.).

This case holds that self-acquired property given by a Mitakshara father to his son will be ancestral property in the hands of the latter unless the donor has manifested a different intention. In reaching that conclusion the Full Bench has followed the ruling in *Nagalinga* v. *Ramachandra*[1]. The decisions of the different High Courts are reviewed in detail. The learned Judges also refer to certain observations of the Privy Council in *Ulagalum Perumal Sethurayar* v. *Subbulakshmi Nachiar*[2], as affording support to their conclusion. In that case an impartible estate had been conveyed by the holder under a settlement to a younger son, on whose death a dispute as to succession arose between the widow of the donee and a half-brother. The latter claimed the estate by survivorship. In the course of its judgment the Privy Council observed: "The High Court was careful to point out that the present case raises no questions such as might have arisen had Minakshisundara (the donee) died leaving sons—whether the estate in his hands was ancestral as having come to him from his father in the sense that a son would have taken an interest therein at his birth. On this subject there has been much divergence of opinion in India, and it was left unsettled by the judgment of the Board in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh*[3]". Upholding the widow's claim on the ground that at any rate as against his collaterals the donee took the property as separate property, the Privy Council concluded: "They say nothing here as to family arrangement or the power of a grantor to impose conditions, but otherwise, so far as regards the joint family, they see considerable difficulty in giving different effect to an alienation made under the power declared to exist in *Sartaj Kuari's case*[4], according as the grant be made voluntarily or for consideration, comprises the whole or only part of the estate, is in favour of a member of the family or a stranger, or in favour of the person entitled to succeed or of some other member of the family. They recognise, however, that as between the grantee and his sons questions may arise upon which these considerations or some of them, may have importance". The claim that the latter part of these observations indicate in a measure their Lordships' inclination to hold that self-acquired property gifted by a father to his son would be ancestral in the hands of the latter is somewhat debatable. Anyway the point raised in (1945) 1 M.L.J. (N.I.C.) at pages 10 to 12 that the effect of the provisions of section 8 of the Transfer of Property Act in regard to the construction of such gifts has not been noticed in the decisions on the matter so far, still remains valid and it will be a question for consideration whether the principle laid down in *Nagalinga's case*[1] would be consistent with the provisions of section 8 of the Transfer of Property Act.

Wamanlal Chhotalal *v.* The Scindia Steam Navigation Co., Ltd., I.L.R. (1944) Bom. 247.

The judgment in this case contains an interesting and elaborate discussion of the question whether the purchase of bullion can constitute an "investment." The facts were that in May 1940, at a time when the political and war situation was particularly grave the directors of the respondent company resolved purely out of considerations of safety to invest a substantial amount in the purchase of bullion and to keep the same in safe custody in a bank. The plaintiff-appellant, who was a shareholder in the said company sued for a declaration that the said transaction was *ultra vires*. It appeared that the objects clause in the Memorandum of Association of the company permitted the company among other things "to invest money of the company in such manner (other than in the shares of this company) as the directors think fit." On this Mr. Justice Kania held, agreeing with the trial Judge Mr. Justice Chagla, that the purchase constituted an investment, while the Chief Justice took a contrary view. The discussion turned

1. (1901) 11 M.L.J. 210: I.L.R. 24 Mad. 429.
2. (1939) 1 M.L.J. 812: L.R. 66 I.A. 134: I.L.R. (1939) Mad. 443 (P.C.).
3. (1923) 47 M.L.J. 260: L.R. 50 I.A. 265: I.L.R. 45 All. 596 (P.C.).
4. (1887) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

on the meaning of the word "invest." On behalf of the plaintiff it was contended that the idea of investment must carry with it the capacity to produce interest, profit or dividend and in that connection the observations of Lawrence, J., in In re *Wragg*: *Wragg* v. *Palmer*[1] and the definition of the word in Murray's Oxford Dictionary were relied on. As against this is the general meaning of the word given in Wharton's Law Lexicon, namely, "to lay out money." The discussion in the judgments as regards the question whether the deposit with a Banker constitutes an investment is really irrelevant for a rendering of the decision on the point raised.

It is submitted that that the view of Kania, J., has greater reason to commend itself for acceptance. It is well to remember in this connection the observations of Lord Simon in *Perrin* v. *Morgan*[2] that "it is a mistake to pick out one interpretation of the word and to call it the "legal" meaning or the "strict legal" meaning as if it had some superior right to prevail over another equally usual and not illegitimate meaning." The word "invest" is undoubtedly used in common parlance with reference to acquisition of land or jewellery. Suppose money is laid out in the purchase of a building site which does not yield any return, can it be said that it is not an investment? The element of profit in such a case must necessarily be problematical. Take again a purchase of non-income yielding but redeemable Government Promissory Notes. Such an issue has been made in India and subscribed to by Princes and business magnates. The paramount idea in such a case may be to support the Government at a time of crisis, but it will none the less be difficult to deny that the lock-up is an investment. The motive with which the money was laid out in such cases will be hardly material; and so the fact that the respondent company purchased the bullion purely out of considerations of safety and not with a view to profit is beside the point. In such a case there is always the possibility of making a profit and the purchase of bullion should therefore be taken to be an investment even if looked at from that narrow point. Although the Judges in the above case differed as to the scope of the word "invest" they agreed in holding that the purchase was in any event an acquisition of "personal estate or effects" within the meaning of another clause in the memorandum of articles and was consequently not *ultra vires* of the directors, and the result was that the decision of the trial Court was upheld on this new point.

JANAKIRAM COMPANY *v.* CHUNILAL SHRIRAM, I.L.R. (1944) Bom. 675.

In this case effect was given to the well-settled rule that an application for review cannot be maintained after an appeal is preferred from the decree. It was held that when a party presents an application for review of judgment after he has filed an appeal from the same, the review application is incompetent even though the Court merely rejects the appeal as beyond time. Reliance was placed on the earlier decision of that Court in *Balling* v. *Devasthan Fund*[3], which however is opposed to *Ram Prasad* v. *Asa Ram*[4]. If in the given case the appeal was incompetent, it can well be said that the appeal was *non est* and that consequently the review application could be proceeded with. As regards the question whether the review application can be proceeded with after the appeal previously filed is withdrawn there is conflict of authority. (Cf. *Gulabkhan* v. *Muniruddin*[5] and *Thakur Singh* v. *Dinanath Sah*[6].) The language of the rule "from which no appeal has been *preferred*" would seem to point to the conclusion that the withdrawal is immaterial and that once the appeal is preferred it bars any application for review. The question has again arisen as to what should happen where an appeal is preferred after an application for review is presented. In such cases the Madras and Calcutta High Courts had little difficulty in holding that the review application could be heard notwithstanding the preferring of the appeal subsequently. (Cf. *Chenna Reddi* v. *Pedda Obi Reddi*[7] and *Rayfield* v. *Raj Narain*[8].)

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1. (1919) 2 Ch. 58.
2. (1943) A.C. 399.
3. (1930) 33 Bom.L.R. 378.
4. (1920) I.L.R. 43 All. 288.
5. (1935) 31 N.L.R. 418.
6. A.I.R. 1937 Pat 528.
7. (1909) 19 M.L.J. 388 : I.L.R. 32 Mad. 416 (F.B.).
8. (1936) 41 C.W.N. 129.

PRASAD CHANDRA BANERJI *v.* EMPEROR, I.L.R. (1944) 1 Cal. 113.

Does the protection given by section 197, Criminal Procedure Code, apply to a person who has ceased to be a public servant at the time the prosecution is launched? It is astonishing that this question which ought to have been perfectly well-settled by decisions is still open to doubt to-day. The authorities are conflicting: The Nagpur and Sindh Courts have held that the protection afforded by the section will apply to a person who was a public servant when the offence was committed, even though he was removed from office when the prosecution was launched. (Cf. *Suganchand* v. *Naraindas*[1]; In re *S. Y. Patil*[2].) "The protection would be largely illusory," observed Pollock, J., in the latter case "if it were open to people to wait until the public servant has ceased to hold that position and then lodge their complaint, for generally there is no question of limitation in criminal proceedings. A public servant who is on the verge of retirement would have no protection whatever." The decision of the Calcutta High Court in the above case dissents from these decisions and holds that the protection does not extend to a person who has ceased to hold office when he was prosecuted. The same view was taken by the Allahabad High Court in *Suraj Narain* v. *Emperor*[3], although strangely enough a reference is not made to this decision in the case on hand. It is difficult to say that the latter view is unsound. The language of the section, namely, "where any public servant . . . . *is accused* of an offence . . . . ." is clearly in favour of such a position. On the other hand, it is undoubtedly harsh that the section, which obviously is based on high policy, should be circumvented in a given case by the removal of the public servant and the prosecution being launched almost immediately thereafter. But that and other similar reasons may be a good ground for legislative amendment but will not justify a forced interpretation of the language of the clause. It is hoped that the section will be suitably modified so as to place the matter beyond doubt. There is no reason why it should not be liberally amended in order to confer the protection on a public servant who has ceased to hold office at the time the prosecution is launched.

In re EAST BENGAL SUGAR MILLS, LTD., I.L.R. (1944) 1 Cal. 118.

A short but interesting point under the Registration Act was decided in this case. It was held that a debenture charged on the entire property of a company including immoveable property must be registered under section 17 of the Registration Act in addition to its registration under section 109 of the Companies Act. It was further pointed out that it was immaterial for this point that there was a floating and not a fixed charge. The practical difficulties of holding the contrary view are forcibly pointed out by the Chief Justice. The object of the Registration Act, namely, to protect the local man, will undoubtedly be nullified if the registration at another place will be sufficient. The compulsory registration under the Registration Act is all the more necessary now because the rule laid down in *Tilakdhari Lal* v. *Khedan Lal*[4] has been modified by the Transfer of Property Amendment Act of 1929, and it has been provided in Explanation I of section 3 of that Act that registration amounts to notice as from the date of registration. The necessity for registration is also supported by the practice adopted under section 30 (2) of the Registration Act in the case of an instrument relating to properties scattered in different registration sub-districts.

MER DIN *v.* KULTILAK RAM, (1943) I.L.R. 25 Lah. 24 (F.B.).

Two questions relating to court-fees arose for decision in this case. The first question was whether when in a suit founded upon two mortgages a lump sum decree has been given in the trial Court without any apportionment of the amount between the two mortgages there should be considered to be one or two "distinct subjects" of the appeal within the meaning of section 17 of the Court-Fees Act.

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1. A.I.R. 1932 Sind 177.
2. A.I.R. 1937 Nag. 293.
3. I.L.R. (1938) All. 776.
4. (1920) 39 M.L.J. 243 : L.R. 47 I.A. 239 : I.L.R. 48 Cal. 1 (P.C.).

The second point was as to the court-fee payable in a case where the subject-matter of the appeal was future interest running to an uncertain date.

The two mortgages were executed as between the same parties charging the same property for the unpaid purchase money. It was held by the Full Bench that court-fee was payable on the aggregate amount and not on the two mortgage amounts treating them as distinct subjects. It is somewhat difficult to follow the reasoning on the point. One of the reasons for the view adopted was that the second mortgage bond merely corrected an error in the first and that it really consolidated the two mortgage debts into one. There was really no error in the first mortgage deed, only on account of the fact that the vendee was not in possession of sufficient funds as contemplated originally he had to execute another deed. It is indeed strange that the motive of the parties and the circumstances attendant on the transaction should be scrutinised for determining the court-fee payable. If the mortgages were in fact entered into separately it is difficult to say that they constitute a single item. It is not analogous to the case where several promissory notes are executed as between the same parties in pursuance of a single contract of loan. On the other hand it resembles cases where separate hundis or promissory notes are executed between the same parties on the same day. In those cases it has been held that the suit embraces distinct subjects. (See *Parshotam Lal* v. *Lachman Das*[1]. See also *Secretary of State* v. *Ayyaswami Chettiar*[2] and *Muthusami Chettiar* v. *Krishna Aiyar*[3].) The fact that the plaintiff or the trial Court treated the claim as one for a consolidated sum will hardly be material. The test in such cases will be whether the mortgagee had separate causes of action or right to obtain relief in respect of the mortgages. It is somewhat strange that the Full Bench did not choose to refer to the direct cases of the other High Courts holding the contrary view. (See *Muthusami Chettiar* v. *Krishna Aiyar*[3], *Radharanee Dassya* v. *Kshetra Mohan*[4] and *R. M. P. L. S. Chettyar Firm* v. *Koormiah*[5].) In those cases, it was pointed out that the question was complicated by reason of the amendment introduced by section 67-A of the Transfer of Property Act, which provides that the mortgagee is bound to sue on all the mortgages executed in his favour by the mortgagor. But, as pointed out in those decisions it is one thing to say that a single suit should be instituted in such cases and it is another thing altogether that the mortgages should be treated as one subject for purposes of court-fees. No doubt in view of the present section 67-A of the Transfer of Property Act the legislature may well take on hand an amendment of section 17 of the Court-Fees Act so as to define exactly what the term "distinct subjects" means and provide therein that in the case of several mortgages or promissory notes between the same parties the suit may be deemed to comprise a single subject. In the absence of such a provision the reasoning in the above case seems somewhat unconvincing.

On the second point as to the court-fee payable on claims for future interest the period for which the claim was made is divisible into parts: the period from the date of the institution of the suit to the date of redemption, and the period from the date of redemption, to the date of realisation. As regards the first portion of the claim the amount is undoubtedly ascertainable by reference to the decree and the possibility of the mortgagee redeeming the mortgage at an earlier date was rightly held to be irrelevant for computing the court-fee, the principle being that the party seeks to get rid of his liability for an ascertained sum as provided in the decree. In respect of future interest however from the date fixed for redemption to the date of realisation the Court again rightly held that as the amount is not capable of ascertainment court-fee is payable under Article 17 (*vi*) of Schedule II of the Court-Fees Act and reliance was placed on *Bhawani Prasad* v. *Kutub-un-Nissa*[6]. It will be illogical in such a case to hold that the appellant should pay court-fee on the estimated interest amount from the date fixed in the decree down to the date of the presentation of the memorandum of appeal.

1. (1887) I.L.R. 9 All. 252.
2. (1932) 65 M.L.J. 252.
3. (1934) 68 M.L.J. 316.
4. (1936) 40 C.W.N. 406.
5. (1940) Rang. L.R. 767.
6. (1905) I.L.R. 27 All. 559.

SUBRAMANIAN *v.* MUTHIAH CHETTIAR, I.L.R. (1945) Mad. 638.

Tempora mutantur. From the days when it was the law that no adoption can be made if its effect would be to divest an estate vested in a person other than the adopting widow, the pendulum has swung to the other end and the present view is that an adoption validly made,—the test being spiritual efficacy or benefit only,—cannot be denied effect and that estates vested in third persons, whether by survivorship, inheritance or reverter, may be divested. Thus in *Anant* v. *Shankar*[1], the Privy Council recognised that where the adoption is by the widow of a pre-deceased collateral of the last surviving coparcener the death of the latter before the adoption is no ground for denying that the interest of the adoptive father or any part of it passes to the adopted son; that an exercise of the power of adoption by the mother of the last surviving coparcener cannot be given less effect than would have attached to an adoption in such circumstances by the widow of a pre-deceased collateral; and, the fact that the property had vested in the meantime in the heir of the last coparcener is not of itself a reason why it should not divest and pass to the adopted son. In that very case, the Privy Council expressly reserved the question as to the effect of the adoption on the adopted son's right to come in as the heir of a collateral who had died before his adoption. In the case under review, however, it is held, though *obiter*, that the adopted son of a widower can on adoption divest the properties of the predeceased wife of the adopter from the person to whom it had passed as heir on her death. The learned Judges point out that "the matter is not covered by judicial decision." Though in a strict sense this is true, there is some authority as to the principle that would govern such a case. In the case in question, one Deivanai died on 28th August, 1938, and her husband made an adoption on 7th June, 1939.

Adoption enim naturam imitatur. The adopted son is the "reflection" of an aurasa son. These are striking and picturesque metaphors, neat and logical. Analogy is however far short of complete identity and incoherence of facts often modify the results of pure logic. Is there then any justification to push the fiction to its logical limits? In permitting the right of adoption to be exercised by a bachelor, in recognising an adoption made by a girl, while still in her teens, of a boy designated by her husband, in refraining from imposing any limit as to the margin of age which should separate the adopter from the adoptee and in various other directions law has not given effect to the principle that adoption imitates nature.

In *Padma Kumari Chowdhrani* v. *Court of Wards*[2], it was stated: "an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined in the Dattaka Chandrika and Dattaka Mimamsa". The principle was reaffirmed in *Pratapsingh Shivsingh* v. *Agarsangji Rajasangji*[3], where the Privy Council observed: "It is an explicit principle of the Hindu law that an adopted son becomes for all purposes the son of his father and that his rights unless curtailed by express texts are in every respect the same as those of a natural born son." It would therefore be idle to deny that the adopted son's rights are not co-terminous ordinarily with those of an aurasa son. The questions will still remain as to the exact point of time from which those rights are to be computed and whether the rule is to be confined in its operation only to the estate of the adoptive father, interpreting that term in a somewhat liberal sense, or whether it is to operate even with reference to the estates of collaterals. As to this point, in *Anant* v. *Shankar*[1], Sir George Rankin observed that after the decision in *Amarendra* v. *Sanatan Singh*[4], the view taken in *Faizuddin Ali Khan* v. *Tincowri Saha*[5], that *Bhoobunmoyee's case*[6], involved that no adopted son could claim as preferential heir the estate of any person other than his adoptive father if such

1. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 : I.L.R. (1944) Bom. 116 (P.C.).
2. (1881) L.R. 8 I.A. 229 : I.L.R. 8 Cal. 302, 311 (P.C.).
3. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).
4. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
5. (1895) I.L.R. 22 Cal. 565, 571.
6. (1865) 10 Moo. I. A. 307 (P.C.).

estate had vested before the adoption in some heir other than the adoptive widow, as well as the view of Telang, J., in *Chandra* v. *Gojrabai*[1] that *Bhoobunmoyee's case*[2] involved that adoption by a widow does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband, are no longer tenable. This does not, however, amount to holding that even the estate of a collateral of the father which prior to the adoption had devolved on the heirs of such collateral on his death can be recalled. Such a contention stands negatived by the observations of the Privy Council in *Bhubaneswari Debi* v. *Nilkomul Lahiri*[3]. In that case there were three brothers Kalimohun, Rammohun and Shibnath. Kalimohun died leaving his son Nilkomul. Rammohun died sonless leaving his wife Chandmoni as heir to his eatate. Shibnath who had survived his brothers died in 1861, empowering his wife Bhubaneswari to adopt. Chandmoni died in 1867 and at the time of her death the nearest reversioner was Nilkomul who accordingly took his uncle's estate as his heir. Bhubaneswari made an adoption in 1879. The adopted son sued for the recovery of a half share of the estate of Rammohun from Nilkomul claiming that his adoption related back to the death of his own father and as such he should be held entitled to share the inheritance that fell open on Chandmoni's death which admittedly was later. It was further claimed that in any event Nilkomul having fraudulently prevented Bhubaneswari from adopting a son till the death of Chandmoni he would be estopped from questioning the claim of the adopted son to a half share of the estate of Rammohun. It was in evidence that the adopted son was born only in 1870 or 1871, that is to say, long subsequent to the death of Chandmoni and the opening of inheritance to Rammohun. In rejecting the claim of the adopted son, Sir Barnes Peacock observed : "If the widow of Shibnath had adopted a son during the lifetime of Chandmoni, that son would have been entitled to a half share of the estate of Rammohun as one of the reversionary heirs of equal degree with Nilkomul, who was also a nephew. But the allegation is, that in consequence of Nilkomul's fraud . . . . . . the widow of Shibnath was unable to get anyone to give her a son in adoption, and could not adopt until after the death of Chandmoni . . . . . . After the death of Chandmoni she did adopt the present plaintiff ; but it appears clearly upon the evidence that the plaintiff was not in existence at the time of the death of Chandmoni. The widow never could, by adoption, if there had been no fraud, have made the present plaintiff a reversionary heir of half the estate of Rammohun, because he was not in existence at the time of Chandmoni's death. According to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as an heir of the collateral." It is obvious that if the boy never could in the course of nature have become the heir of Rammohun's estate due to his being unborn or unconceived at the time of Rammohun's death, he could not as the result of adoption improve his position. The case could have been disposed of on that short ground. It, therefore, follows that the last part of Sir Barnes Peacock's observations cited *supra* is open to the comment that it is only *obiter*. Adverting to this case, in *Anant* v. *Shankar*[4], Sir George Rankin remarked : "Neither the present case nor *Amarendra's case*[5] brings into question the rule of law considered in *Bhubaneswari Debi* v. *Nilkomul Lahiri*[3], and stated by the Board to be that 'according to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as an heir of the collateral'." It would, therefore, be safe to presume that Sir Barnes Peacock's observation though *obiter* is yet sound law. It has been so viewed in *Chandrachoor Deo* v. *Bibhutibhushan Deva*[6]. The fact that in *Amarendra's case*[5], Amarendra was allowed to succeed *directly* to Bibhudendra, a collateral (brother), and divest the estate from Banamali who had taken it as heir to

1. (1890) I.L.R. 14 Bom. 469.
2. (1865) 10 Moo. I.A. 307 (P.C.).
3. (1885) L.R. 12 I.A. 137 : I.L.R. 12 Cal. 18 (P.C.).
4. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 : I.L.R. (1944) Bom. 116 (P.C.).
5. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
6. (1945) I.L.R. 23 Pat. 763.

Bibhudendra on the latter's death and before the adoption, was regarded by the learned Judges as unhelpful in view of the fact that the estate in question was, in the larger sense of the term, really that of the adoptive father and on adoption the adopted son's rights would relate back to the death of his adoptive father. That this distinction is sound is borne out by the express statement in *Anant* v. *Shankar*,[1] that neither that case nor *Amarendra's case*[2] brings into question the rule in *Bhubaneswari's case*[3]. Meredith, J., one of the learned Judges who decided the case, further pointed out: "The fiction of dating back is only for the purpose of continuing the line and conferring spiritual benefit upon the father and to a lesser extent upon the family ancestors. It is not a fiction which it is either necessary or desirable to adopt for all purposes. The son becomes a son for all purposes and as such can inherit the property of collaterals no doubt. But the question of *what* he becomes is distinct from the question of *when* he becomes it." The learned Judges held that it is only for purposes of his father's estate that adoption will relate back to the death of the adoptive father but not for enabling the adopted son to come in as an heir of his father's collateral who had died before his adoption.

The case under examination stands differently on facts. The adoption here was not by a widow but by a widower. The estate concerned was neither that of the adoptive father nor that of his descendants or of collaterals. Adoption no doubt relates back to the death of the adoptive father but it had not so far been stated that it relates back to the death of the adoptive mother also. That adoption makes the boy a son is a fiction. To extend it so as to make a predeceased wife of the adopter a mother to the boy, and her ancestors his maternal ancestors, is to superimpose a further fiction on the original one and as such would attract *atidesa dhosha.* Cases have, however, held that where a widower adopts, his predeceased wife will in the absence of any further complication be regarded as the adoptive mother of the boy. In *Sundaramma* v. *Venkatasubba Ayyar*,[4] Phillips, J., observed: "Wherever possible . . . . a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption." Madhavan Nair, J., stated: "To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child". The decision only indicates that wherever *possible* the principle that adoption imitates nature may be given effect to. The view was affirmed in *Sownthara Pandian* v. *Periaveeran Thevan*[5]. Both the cases were cases of succession to persons who died *subsequent* to the adoption. An observation of Madhavan Nair, J., in *Sundaramma's case*[4] would suggest that where a son adopted by a widower claims rights *ex parte materna* the claim will be tenable only where the inheritance opens subsequent to the adoption. The learned Judge remarked: "As his adoption puts the adopted son in the place of a legitimate son as regards the rights of inheritance in the family of the adopter, he must be considered to be the heir to *any rights arising after the adoption* from his father's wife's position in the adoptive family, though she was not alive at the time of adoption." The statement hardly affords warrant for the view that the adopted son can lay claim to the property of the adoptive mother who had died *prior* to the adoption. In the case under review the learned Judges arrived at that view mainly on two grounds: (i) the principle that adoption imitates nature compels, in the case of a widower's adoption, that a retrospective effect should be given to the adoption, carrying it back to the date of the death of the wife; (ii) if adoption by a widow could give the adopted son rights as from the date of the death of the adoptive father, it must equally in the case of an adoption by a widower make the rights of the boy go back to the

1. (1943) 2 M.L.J. 599: L.R. 70 I.A. 232: I.L.R. (1944) Bom. 116 (P.C.).
2. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
3. (1885) L.R. 12 I.A. 137: I.L.R. 12 Cal. 18 (P.C.).
4. (1926) 51 M.L.J. 545: I.L.R. 49 Mad. 941.
5. (1933) 65 M.L.J. 58: I.L.R. 56 Mad. 759 (F.B.).

date of the death of the wife. The reasons are no doubt attractive but hardly conclusive. In regard to the first ground it overlooks the fact that the principle has in a number of instances not been observed (*e.g.*, in the case of a bachelor's adoption) and in fact has been applied only where no hardship is likely to be occasioned. In regard to the second reason, it may be pointed out that it does not fit in with the caution enjoined in *Subramanian Chettiar* v. *Somasundaram Chettiar*[1] that "even a fiction cannot be carried to illogical limits"; that it does not allow for the reservation made by the Privy Council in *Anant* v. *Shankar*[2], in regard to the ruling of the Privy Council in *Bhubaneswari Debi's case*[3]; that it does not take note of the limitation suggested by Madhavan Nair, J., that the adopted son should be considered heir to rights *arising after* the adoption from his father's wife's position in the adoptive family and that it involves the superimposition of a number of fictions one over the other. It is also not in consonance with the view expressed in *Chandrachoor Deb* v. *Bibhutibhushan Deva*[4] that adoption has retrospective effect only *quod* the estate of the adoptive father or his descendants but not in other cases.

In re MUTHU NADAR, (1945) 1 M.L.J. 180.

An interesting question in the law of punishments fell to be decided in this case which holds that the passing of a sentence of imprisonment till the rising of the Court is not *per se* invalid. In In re *Kunhi Bava*[5], Jackson, J., remarked: "When the statute lays down that for a certain offence . . . . the punishment shall be imprisonment, it means that the offender shall go to gaol and imprisonment till the rising of the Court is a clear evasion of that intention." Likewise in In re *Ramalingayya*,[6] Horwill, J., observed apropos of such a sentence that "it is not a form of punishment recognised by law and it is used to circumvent the provisions of law that require a sentence of imprisonment in gaol for a particular term." These remarks are, with respect, open to a twofold criticism. It is not correct that imprisonment necessarily involves the idea that the offender shall go to gaol; it is equally a mistake to suggest that the statute requires imprisonment to be in gaol only. "Imprisonment" according to the *Termes de la Ley*[7] "is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stocks, or cage in the streets, or in a man's own house, as well as in the common gaol; and in all these places, the party so restrained is said to be a prisoner so long as he hath not his liberty freely to go at all times to all places whither he will, without baile or mainprise or otherwise." Coke on Littleton[8] is to a similar effect. According to it, imprisonment is the restraint of a man's liberty under the custody of another; and extends not only to a gaol but to a house, etc., for in all these cases the party so restrained is said to be a prisoner so long as he hath not his liberty to go about his business as at other times. Bouvier[9] is explicit that imprisonment may be either in a place made use of for purposes of imprisonment generally or in any locality whatever. Among the decided cases, in *Bird* v. *Jones*[10] it was stated by Coleridge, J.: "It is one part of the definition of freedom to be able to go wheresoever one pleases, but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own." This definition was followed in *P. Narasayya Pantulu* v. *Capt. R. A. C. Stuart*[11], where the Court observed: "The retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises the exterior will." If imprisonment means merely the restraint of liberty of a person and is altogether independent of any place or

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1. (1937) 1 M.L.J. 60: I.L.R. 59 Mad. 1064.
2. (1943) 2 M.L.J. 599: L.R. 70 I.A. 232: I.L.R. (1944) Bom. 116 (P.C.).
3. (1885) L.R. 12 I.A. 137: I.L.R. 12 Cal. 18 (P.C.).
4. (1945) I.L.R. 23 Pat. 763.
5. (1928) 56 M.L.J. 550.
6. (1942) 2 M.L.J. 357.
7. See also *R.* v. *Pelham*, (1846) 8 Q.B. 959 at 963.
8. P. 253.
9. 1897 Edition, Vol. I, p. 994.
10. (1845) 7 Q.B. 742: 115 E.R. 668.
11. (1865) 2 M.H.C.R. 396.

limit of time, the question is whether there is anything in the statute law of this country making it imperative that imprisonment should only be in gaol or that it cannot be for a period co-extensive with the rising of the Court for the day. There is nothing in the scheme of the Indian Penal Code suggesting that imprisonment should be served only in gaol. Nor is there any rule that imprisonment shall under no circumstances, where awarded, be for a term less than any particular period. The sections of the Code always indicate the maximum and only a few sections prescribe the minimum sentence to be awarded. That a sentence of imprisonment may be for a day is expressly contemplated in section 510. In the absence therefore of any statutory prescription to the contrary there seems to be nothing in law to make unlawful the award of imprisonment till the rising of the Court. In fact the rules recognise the validity of such a punishment clearly. Rule 102 of the Madras Criminal Rules of Practice says : " The Government consider the awarding of short term imprisonments as undesirable and Magistrates, before passing such sentences, should consider whether imprisonments till the rising of the Court allowed by law could not appropriately be passed instead . . . ." The decision under notice is thus in full accord with the principles of English law and is not in any way counter to any provision of law in this country.

KESAR CHAND *v.* UTTAM CHAND, (1945) 2 M.L.J. 160 (P.C.).

This is yet another pronouncement of the Privy Council on the law bearing on antecedent debts, though only incidentally. A text of Brihaspati postulates the liability of the son to pay a debt contracted by his father on account of his standing surety for payment of money lent. It has all along been understood that if as the result of default by the debtor the father's liability as surety has matured into a debt the principle of pious obligation can be invoked so long as there is nothing either illegal or immoral about the transaction. A question of an altogether different character arises where a Mitakshara father binds family property by executing a surety bond in security for payment of a debt due by third parties. It has been held that in such cases the family properties will not be bound, see *Ganga Saran v. Ganeshi Lal*[1]. The case under review approves that view. In answering the question that way, Sir Madhavan Nair observed : " To make the ancestral property liable, there must in reality be a debt due by the father. In the present case the security bond was executed not for the payment of any debt due by Uttam Chand, but for payment of a debt which was due from third parties. Unless there was a debt by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property." Admittedly the liability of the father, if any, was incurred under the security bond itself and not independently of or truly dissociated from it. Further the liability was only prospective and not actual. There being no indebtedness of the father at the time of the creation of the charge it followed that the family property will not be bound.

EKAMBARESWARASWAMI TEMPLE *v.* PROVINCIAL GOVERNMENT OF MADRAS, (1945) 1 M.L.J. 317 ; VENKATA KOTAYYA SASTRI *v.* PROVINCE OF MADRAS, (1945) 2 M.L.J. 250.

The question of ownership of the beds and banks of channels of irrigation as conferring rights to a free supply of water for purposes of cultivation is one of unfailing interest often characterised by considerable complexity, particularly in this country, where the position of the state *vis a vis* the cultivator has been one of conflicting and shifting ideologies and there is a multiplicity of interests in land. Not often has the approach to any question been so radically revised as in the case of entire inam villages. Even after the ruling in the *Urlam case*[2] that the effect of the permanent settlement sanad was to vest in the zemindar the beds and banks of the channels with their head sluices and branch and subsidiary channels lying within

1. I.L.R. (1939) All. 451 (F.B.). I.L.R. 40 Mad. 886 (P.C.).
2. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 :

the zemin limits and that it made no difference even if the channels were natural streams, it was suggested that inam villages may stand on a different footing, see *Secretary of State* v. *Narayana Aiyar*[1]. In *Ambalavana* v. *Secretary of State*[2] and *Narayanaswami Naidu* v. *Secretary of State*[3], it was held that where the channel is the source of irrigation not merely for the inam village but for other ayan villages also a presumption will arise that the channel was not to pass under the grant. Even in the absence of any such consideration it was suggested that as it was possible that the inamdar may not under the grant get the full ownership even where the grant was one of " land," he may not be entitled to the beds and banks of the irrigation channels flowing through the village (*Secretary of State* v. *Narayana Aiyar*[1]) though the Privy Council had in *Venkata Sastrulu* v. *Sitaramudu*[4], referred to the possession of both varams in the land as the possession of the " whole proprietary interest." On all these matters the law has undergone modification. The line of thought set out *supra* was modified in *Venkatakrishnamaraju* v. *Suryanarayanaraju*[5], where it was observed that if the grant was of the " land," it would even if " incomplete " be yet " ownership for certain purposes." Earlier, in *Yahya Ali Saheb* v. *Secretary of State*[6], it had been recognised that the Inam Settlement was as much an " engagement " within the meaning of Madras Act VII of 1865 as the Permanent Settlement. Many of these questions fell to be authoritatively considered by the Judicial Committee in *Secretary of State* v. *Varada Thirtha Swamigal*[7]. There, reference was made to the practice that in the case of grants of whole inam villages the title deed usually contained the words " besides poramboke " to indicate that all the lands were granted and no reservation was made. It was also pointed out that the failure to mention those words would not necessarily mean that there was any reservation by the grantor of the poramboke lands and therefore of the beds of channels or that all the lands were not conveyed. The *Urlam case*[8] was referred to as laying down that even if any part of the water carried by the channels was to be specially safeguarded in the interests of other government villages it would be enough to imply a reservation of water rights as distinguished from a reservation of the beds and bunds of the channels of irrigation. In the first of the decisions under notice, it was held in accordance with these principles, that that portion of the channel wholly within the limits of the inam village concerned in the case passed to the inamdars, no reservation of the channel in favour of the government being found. The other decision dealt with certain other aspects of the matter. It is there pointed out that in the case of entire village grants the presumption is that that part of the channel which flows through the village was included in the grant; that the burden of proving the contrary lies on government; that if the government sets up that a particular channel by reason of certain special circumstances was reserved, it is for the government to prove the fact; and, the fact that the channel serves government villages lower down cannot *per se* imply any reservation by government of its bed and banks, nor the fact that the course of the channel within the village bore but a small proportion to the total length of the channel, nor the circumstance that the lands granted were all dry at the time of the grant. It may be mentioned that for this purpose, as indicated in the *Swamigal case*[7], the fact that the inam village lay outside and not inside zemin limits is hardly relevant. Another point touched upon in the first of the decisions under review concerns the measure and limits of the right of user of water. In the *Urlam case*[8], in the case of zemins, it was stated that the right is measured by the physical conditions of the channel as they were at the time of the permanent settlement. The *Swamigal case*[7] holds the rule to be applicable to inam villages. Sir George Rankin there observed : " When it is said that the inamdar's or zemindar's right to water is measured by the physical conditions at the channel heads, it is not of course intended that at all seasons he is entitled to a volume of

1. (1937) 2 M.L.J. 178.
2. (1905) 15 M.L.J. 251 : I.L.R. 28 Mad. 559.
3. (1912) 24 M.L.J. 30.
4. (1919) 37 M.L.J. 42, 45 : L.R. 46 I.A. 123 : I.L.R. 43 Mad. 166 (P.C.).
5. (1933) 67 M.L.J. 544 : I.L.R. 57 Mad. 460.
6. (1927) 53 M.L.J. 769, 785.
7. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).
8. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 : I.L.R. 40 Mad. 886 (P.C.).

water amounting to the full capacity of the channels. It is only meant that up to the measure of that capacity he is entitled to such water as can flow into them, the condition of the 'river' or 'upper channel' being what it is from time to time." Both the decisions also fully recognise that the right is not in any way affected by the extent of wet land under cultivation at the time of the settlement or grant and that a thrifty user of the water resulting in extended cultivation will not afford cause for the imposition of a levy under the provisions of the Madras Irrigation Cess Act. The first of the decisions under notice reiterates this view.

SUBBARAMI REDDY *v.* CHENCHURAGHAVA REDDY, (1945) 1 M.L.J. 151.

An interesting question of Hindu law fell to be settled in this case which lays down that a grandfather in separating himself from his grandsons has no authority to compel a severance as between the grandsons *inter se*. While conceding that in similar circumstances a father can bring about a division as between his sons, it is stated that the grandfather's position *vis a vis* his grandsons is different. The basis of the decision is that while a father is the natural guardian of his sons and therefore can affect their status, a grandfather is not a natural guardian of his grandsons and unless appointed by the Court cannot act as guardian at all. It may, with respect, be pointed out that the question admits of a fuller discussion. The doctrine of unilateral declaration by which it is competent to a member of a Mitakshara joint family to separate himself has brought in its wake the corollary that there is no presumption that when one member separates himself from the rest the latter remain joint. It is true the other members may remain joint but that is stated to be a question of intention which must no doubt be proved, see *Ram Narain Sahu* v. *Mt. Makhna*[1]. There is no limitation that the principle operates only when the remaining coparceners are adults or that it applies only as between the several branches alone and not within a branch. May it not therefore be plausibly argued that when a grandfather separates himself from his grandsons there is in law a severance between the grandsons also and that where they are minors there can be no manifestation of an intention on their part to continue united?

Be that as it may, early authorities seem to suggest that the father's power to impose a partition among his sons *inter se* does not rest on any theory of guardianship. For one thing the theory will not fit in where the sons are adults. It cannot work where effecting a partition between the sons may not be in their interests. It will be inconsistent with the principle of independent representation for minors as regards their interests where such interests collide either with those of the father or where as between themselves their interests may not be identical. The explanation of the father's power has therefore to be sought elsewhere. The Mitakshara lays down[2]: "When a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two or more sons." Balambhatta's comment is: "He may make them distinct and several by giving to them shares of the inheritance." The further statement in the Mitakshara[3] that the father may separate the eldest with the best share, the middlemost with a middle share and the youngest with the worst share shows that the father's power is not restricted to the ascertainment of his own share but that it extends also to the allotment of shares to his sons. The Smriti Chandrika also has recognised the father's power.[4] In *Kandaswami* v. *Doraiswami Aiyar*,[5] Muttuswami Ayyar, J, observed: ". . that according to the Hindu law a partition made by the father is binding on the sons not only in respect of the father's share, but also of their own shares provided that it is made subject to the restriction mentioned in the Hindu Law and that it becomes obligatory *by will of the father* as regulated and restrained by the law irrespective of the consent of sons." In regard to the basis of the power the learned Judge observes: "This power of distribution is . . . . an incident, not of ownership, but of paternal power though that power must be exercised without partiality and within the limits fixed

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1. (1939) 2 M.L.J. 569: I.L.R. (1939) All. 680 (P.C.).
2. Ch. I, s. 2, vol. 2.
3. Ch. II, s. 2, para 3.
4. Ch. II, s. 1, para 3.
5. (1880) I.L.R. 2 Mad. 317.

by the law." The decision in this case has been followed in a number of cases, see *Visalakshi Ammal* v. *Sivaramien*[1], *Roop Lal* v. *Lakshmi Doss*[2], *Singa Iyer* v. *Venkatarama Iyer*,[3] *Murugayya Maniyakaran* v. *Palaniyandi Maniyakaran*[4], *Ganpat* v. *Gopal Rao.*[5] That the father's power takes root in the ancient doctrine of *patria potestas* is consistent with the texts equating a wife, a slave and a son in regard to their incapacity to own property independently and the texts of Manu and Vasishta as to the source of the parental power to give the son in adoption. If the father's power to impose partition is attributable to his potestas, by parity of reasoning a similar power would be available to the grandfather. In the domain of property law the son, grandson and the great-grandson have been treated alike for various purposes. This line of argument is no doubt open to the criticism that, if correct, it should give the grandfather also a right to give away his grandson in adoption. It may, however, be answered by saying that even if the power is not found in one direction it does not mean that the analogy fails in other directions also.

It has been stated in the case under notice that the ruling in *Aiyavier* v. *Subramania Aiyar*[6], does not show that in that case the grandfather had not merely separated himself but separated the grandsons also *inter se*. The facts are by no means clear. The observation of Oldfield, J.: "I find no difficulty in holding that the settlor's intention was to make a partition, the reference to plaintiffs' incapacity having no effect, except that their shares were vested during its continuance in first defendant for their benefit."—seems, however, to suggest that there was such a severance; otherwise the reference to their *shares* may not strictly be correct. *Lakshmibai* v. *Ganpat Moroba*[7] is another decision which is of somewhat dubious assistance in regard to the present question. While West and Buhler have read the decision as suggesting that the grandfather has the power to effect a severance of status not merely as between him and his grandsons but also as between the latter *inter se* and have recorded their dissent from that view, Mayne regards the case as not postulating any such conclusion. In that case a person made testamentary dispositions in regard to property which had fallen to his share on a partition between himself and his brother. The testator had sons and grandsons. After the testator's death the dispositions under the will were acted upon; a commissioner was appointed and the properties were divided and allotted to each of the sons and grandsons, the latter being minors; and after attainment of majority the minors had in a measure acquiesced in what had happened. In a suit thereafter impeaching the validity of the will and its dispositions, the learned Judge in affirming the arrangements that had been made and acted upon, observed: "Here the testator . . . though undoubtedly dealing with his share of the property partitioned in 1823 as separate, and not as joint family property, has not . . . at all exceeded the powers which according to a long current of uncontested decisions and by law vested in a Hindu, when disposing by will of his separate property. He has excluded none who by the ordinary course of descent would have had any right to inherit and he has divided his residuary estate into three equal shares giving one of such shares to each of his two then surviving sons and the remaining third in equal portions to the four sons of the only one amongst his own deceased sons who left male issue." The learned Judge had also held that the testator could competently dispose of by will property taken by him on partition, though he had sons and grandsons. The observations of the trial Judge coupled with the dismissal of the suit, agreed in by the appellate Court, would suggest that according to the Judges there was no objection in law to the grandfather's effecting a severance between the grandsons *inter se*. The decision under notice has at any rate swept away a power whose existence could be justified only on antiquated and anachronistic doctrines, at any rate, as regards the grandfather *vis a vis* his grandsons.

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1. (1904) 14 M.L.J. 310: I.L.R. 27 Mad. 577.
2. (1905) I.L.R. 29 Mad. 1.
3. (1913) 23 I.C. 6.
4. (1916) 31 M.L.J. 147.
5. (1899) I.L.R. 23 Bom. 636.
6. (1917) 32 M.L.J. 439.
7. (1867) 4 Bom.H.C.R. 150.

Chandrasekhara Aiyar and Rajamannar, JJ. Official Receiver, Vizagapatam, *v.* Suryanarayana.
29*th October*, 1945. Ap. Nos. 55, etc. of 1944.

Provincial Insolvency Act (*V of* 1920), *section* 20—Interim *receiver appointed under—Power to maintain suit to recover possession of property of insolvents which has passed into the hands of third party—Insolvency Court if can confer.*

There is nothing in the Provincial Insolvency Act which prevents the Insolvency Court from according sanction to an *interim* receiver appointed under section 20 of the Provincial Insolvency Act to institute suits even against third parties for the vindication of the rights of the debtors in respect of whom an Insolvency Petition is pending. The *interim* receiver in insolvency has such of the powers conferrable on a receiver appointed under the Code of Civil Procedure as the Court may direct.

B. V. Ramanarasu for *V. Govindarajachari* and *V. V. Raghavan* for Appellant.

B. Jagannadhadas, C. V. Dikshitulu, Kasturi Seshagiri Row, D. V. Reddi Pantulu and *N. K. Vinayakam* for Respondents.

K.S.

Chandrasekhara Aiyar, J. Chathu Nayar *v.* Janaki Amma.
2*nd November*, 1945. A. A. O. No. 493 of 1944.

Malabar Compensation for Tenants Improvements Act (*I of* 1900)—*Decree for redemption of kanom—Purchase by another in sale in execution of decree against the holder of redemption decree—Execution by such purchaser—Objection to validity of sale of decree—Sustainability—Madras Civil Rules of Practice, Rule* 178—*Scope—Deposit of kanom amount and value of improvements—Not a condition precedent to execution—Future rent till surrender of possession—Right to—Set off against value of improvements—Permissibility—Civil Procedure Code* (*V of* 1908), *Order* 20, *rule* 12—*If abrogated by Malabar Compensation for Tenants Improvements Act.*

A decree for redemption of a kanom was passed on 29th June 1923 in favour of the melcharthdar and determined the amounts due to the several defendants as value of improvements. The decree directed that on the plaintiff paying into Court the kanom amount and the value of the improvements less certain damages payable by the second defendant and future rent until surrender, the defendants should give up possession of the property to the plaintiff. The decree was attached and purchased in the sale in execution by a creditor of the decree-holder and the purchaser sought to execute the decree.

Held : (1) Though Rule 178 of the Civil Rules of Practice (Madras) says that no decree shall be ordered to be sold in execution of another decree, when such a sale takes place, without any objection being raised by the judgment-debtor, the sale cannot be held to be void or inoperative. 34 Mad. 442 relied on.

(2) The deposit of the kanom amount and the value of the improvements is not a condition precedent to the execution of the redemption decree. It is sufficient if the amount is paid before the properties are surrendered.

(3) The tenant is entitled to set off against the value of improvements due to him the future rents till the actual date of surrender of possession in a case coming under the Malabar Compensation for Tenants Improvements Act. The jurisdiction to award future rent can be exercised not only at the time of passing the decree but also later in the course of execution. It cannot be said in such a case that the provisions of Order 20, rule 12 of the Code of Civil Procedure apply to bar recovery of future rent for any period over 3 years.

P. Govinda Menon for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

Kuppuswami Aiyar, J. Lakshmiah, *In re.*
9*th November*, 1945. Cr.R.C. No. 644 of 1945.
(Cr.R.P. No. 602 of 1945).

Madras Motor Vehicles Rules—Rule 220—" *Loitering* "—*Gist of offence—Waiting before hotel to pick up passengers—Offence.*

It cannot be said that the offence under rule 220 of the Motor Vehicles Rules requires that the delay must be of such a character as to prevent the bus from reaching the destination in time. What is made an offence under the rule is loitering on the road. Where it is found that the driver was stopping his bus in front of a hotel so that he might pick up some passengers from there it amounts to "lingering on the way". Waiting for passangers who had gone to the hotel at a place which is not a stopping place for nearly ten or fifteen minutes is certainly lingering on the way so as to make the driver guilty under rule 220 of the Motor Vehicles Rules.

K. Kalyanasundaram and *R. Santanam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.
N R C

Chandrasekhara Aiyar, J. Ramappa and others, In *re.*
12th November, 1945. C.M.P. No. 5402 of 1945.

Civil Procedure Code (V of 1908), *Order* 41-*A* (*Madras*) *rules* 1 *and* 2—*Provision for production of printed copies of judgment—If mandatory—Power of Court to dispense with production of requisite number of printed copies of judgment appealed against.*

The Court has power to dispense with the production of the twelve printed copies of the judgment appealed against so long as a certified copy of the judgment is there. Order 41-A rule 1 (Madras) is only a modification to the rules contained in Order 41, rule 1 of the Civil Procedure Code. The power to dispense with the production of copies of judgment contained in Order 41, rule 1 of the Civil Procedure Code is not taken away but continues. (1945) 1 M.L.J. 268, dissented from.

A. Bhujanga Rao and *D. R. Krishna Rao* for Petitioner.

K.S.

Chandrasekhara Aiyar, J. Marideyya *In re.*
16th November, 1945. Cr.R.C. No. 820 of 1945.
(Case Refd. No. 44 of 1945).

Criminal Procedure Code (V of 1898), *section* 397—*Sentence of imprisonment—If can be postponed so as to take effect after the sentence for default in furnishing security.*

Under section 397 of the Criminal Procedure Code a sentence passed on conviction should commence immediately and cannot be postponed so as to take effect after the sentence for default in furnishing security.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. Rangaraju, *In re.*
23rd November, 1945. Crl. R.C. No. 552 of 1945.

Madras Abkari Act (I of 1886) *section* 56-*B*—*Mere opening of depot after hours permirtted by license without effecting sales—If offence.*

Where a condition in a license to a toddy depot keeper permitted him to keep open his depot till 6 P.M. only, the mere opening of the shop after that hour will not constitute an offence of breach of the condition in the absence of proof either direct or circumstancial that toddy was sold after the hour specified in the license.

T. R. Venkataraman for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth and *Rajamannar, JJ.* Shanmugasundaram Pillai *v.* Muthukumaraswami Pillai.
26th November, 1945. Appeal No. 409 of 1944.

Provincial Insolvency Act (V of 1920), *section* 53—*Partition between Hindu insolvent and sons attacked as sham, colourable and not intended to be given effect to, but to be kept as a secret weapon against the creditors —Representative suit by creditors attacking the partition—Nature of relief that can be given.*

Where on the adjudication as insolvent of a Hindu father, the creditors with the leave of the insolvency Court filed a representative suit challenging that a partition between the insolvent and his sons was a sham and colourable transaction not intended to be given effect to as between themselves but to be kept as a secret weapon against the creditors,

Held, Whether the partition deed be a sham transaction or whether it be valid so far as it effects a severance of status but fraudulent in that it makes unequal allotment of the available assests and debts with a view to defeat the creditors, the remedy of the creditors, is not to ask for a re-partition, but to ask for a declaration regarding the nature of the transaction and its validity *vis a vis* the creditors.

If it is a mere colourable partition not meant to operate between the parties it can be ignored and the creditor can enforce his remedies as if the parties still continued to be joint. But if it is a fraudulent allotment of shares to defeat the creditors, the latter can avoid the partition under section 53 of the Provincial Insolvency Act and proceed against what would be the insolvent's proper share ignoring the allotment of the properties at the partition.

(1944) 1 M.L.J. 384 and 54 M.L.J. 726, referred to.

K. P. Ramakrishan Aiyar, R. Viswanathan and *T. R. Srinivasan* for Appellant.

K. S. Desikan and *K. Raman* for Respondent.

K.S.

Wadsworth and Rajamannar, JJ. Jainambukanni Ammal *v.* Ruthrapathi Pillai.
7th November, 1945. Appeal No. 414 of 1944.

Civil Procedure Code (*V of* 1908), *section* 92—*Charity whether true beneficiary or entitled only to a charge for its performance—Test—Property endowed and temple situate in British India and income to be applied abroad —Suit under section* 92, *Code of Civil Procedure* (*V of* 1908), *in respect of such properties—Jurisdiction of British Indian Court.*

A settlement deed was in the following terms :—I have made the following arrangement in respect of the property specified hereunder which was acquired by me out of my own earnings, and which has been in my enjoyment with miras for the salvation of my soul. Out of the funds of the aforesaid property *Thannirpandal* (water-shed) charity shall be conducted for seven days on the occasion of the Masi Makham festival of Sri Souriraja Perumal at Tirukannapuram. During the Makham festival day, 100 persons shall be fed and the charity conducted. Out of the income derived from the aforesaid land, excluding the Government kist, etc. and expenses in connection with the charity the remaining income shall be utilised for the maintenance of my sons who have come from the east, *viz.*, (1) *S* and (2) *N* and (3) my wife *T*. The aforesaid charity and the aforesaid property shall be managed by my eldest son-in-law *G*. After the said *G* the aforesaid charity and the said family shall be managed by his nominee.

G obtained a release from the sons *S* and *N* and executed a will treating the property as absolutely his own, subject to an obligation to conduct the charity making provision for payment of maintenance to members of his family and making his son *M* the trustee of the charity after him. After *G's* death *M* became trustee in accordance with the will but sold the property to various people.

In a suit under section 92 of the Code of Civil Procedure for removal of the trustee, setting aside the alienations and framing of a scheme in respect of the charity,

Held : (1) reading the settlement deed as a whole there was no gift of the surplus income or the property to the sons or members of the family generally.

(2) The charity itself is the true beneficiary and *G* should be considered to be a trustee of the charity and the only obligation of the trustee for the time being was to utilise the surplus income, if any, for the maintenance of the three specified relatives after whose death or effacement otherwise, there would be no obligation on the trustee to utilise any part of the income of the property for any object other than the charitable object mentioned in the document.

(3) *M* as trustee was not entitled to alienate the properties which belonged to the trust, as in the absence of any necessity of the charity the alienations will not be binding on the charity.

(4) The Temple of Sri Souriraja Perumal being at Tirukannapuram which is admittedly in British India the fact that on Masi Makham day, the deity is taken to the beach in Tirumalarayanpatnam which is in French territory cannot deprive the British Indian Court of jurisdiction to entertain the scheme suit. The temple as well as the property being in British India no relief in respect of the property can be obtained except from a British Indian Court.

(1944) 1 M.L.J. 466 (P.C.), distinguished.

L. R. 2 Ch. Appeals 356, relied on.

S. Tyagaraja Aiyar for Appellants.

C. A. Seshagiri Sastri and *K. Muthuswami Chettiar* for Respondents.

K.S.

Rajamannar, J. Samanthaka Nadar *v.* James.
9th November, 1945. S.A. No. 1627 of 1944.

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 9—*Scope—Suit on behalf of minor dismissed—Gross negligence of the guardian—Effect on bar under Order* 9, *rule* 9, *to fresh suit for same relief.*

Where a suit filed on behalf of a minor was dismissed and it is found that the guardian of the minor had been grossly negligent at the time of the suit, the minor is not debarred from filing another suit for the same relief. The statutory bar under Order 9, rule 9 of the Code of Civil Procedure can be surmounted by proof of gross negligence of the minor's guardian in the prior suit.

[Leave granted.]

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Appellant.

A. Swaminatha Aiyar for Respondent.

K.S.

Bell, J. Viswanatha Iyer *v.* Sankaranarayana Iyer.
19th November, 1945. A. A. A. O. No. 295 of 1944.

Transfer of Property Act (*IV of* 1882), *section* 39—*Hindu widow's claim to maintenance—Absence of any charge created for maintenance—Widow cannot enforce claim against the alienee.*

A claim by a Hindu widow for maintenance unsupported by a charge forms no encumbrance whatsoever on the property. There must be something in the nature of a charge before property which passes to a creditor or other alienee goes to him encumbered with the maintenance of a widow. There is no trust either in respect of such property which will enable her to follow it as trust property.

[Authorities discussed].

P. R. Ramakrishna Aiyar and *C. K. Viswanatha Aiyar* for Appellant.

C. S. Swaminathan for Respondent.

K.S.

NRC

Wadsworth and Rajamannar, JJ. Yanadamma *v.* Venkateswarulu.
20th November, 1945. Appeal No. 534 of 1944.

Registration Act (XVI of 1908, *as amended in* 1929), *section* 17 (2) (*v*)—*Award of arbitrators—When falls under exception—Test.*

When there is a dispute between parties and that dispute is referred to arbitrators whose decision the parties agree to accept, there is, in fact, a contract between these parties, the final terms of which will embody the decision of the arbitrators on the point referred to them. If the nature of the contract between the parties is such that it actually declares or creates or assigns any interest in immoveable property, the award just like any other contract having that effect, must be registered. If, however, the contract between the parties merely relates to the terms on which one party shall have the right to demand from the other party a future conveyance of property, then the award which settles the terms upon which this future conveyance should be made, is nothing more than part of an agreement to convey in future which falls under the exception in section 17 (2) (*v*) of the Registration Act.

Where the dispute was as to the quantum of property to be assigned in lieu of maintenance and the decision of the arbitrators settled this, the award confers only a right on one party to require the other to convey the property selected by the arbitrators and does not require to be registered.

V. Subramaniam for Appellants.

K. Kotayya and *K. Ramamurti* for Respondents.

K.S.

Bell, J. Chunilal Sowcar *v.* Srinivasa Rao.
21st November, 1945. C. R. P. No. 921 of 1945.

Provincial Insolvency Act (V of 1920), *section* 79—*Madras High Court Rules under—Rule* 21 (3)—*Amendment of* 29*th February,* 1944—*If retrospective.*

The amendment of 29th February, 1944, to rule 21, sub-rule 3 of the Rules framed under section 79 of the Provincial Insolvency Act making it necessary that notices of the date fixed for the hearing of an insolvency petition must be served not only on the creditors and the debtor but on any transferee, the transfer in whose favour is alleged to be an act of insolvency, is not retrospective. The fact that the amendment came into force during the pendency of an appeal in which on the basis of the amended rule an alienee applied to be impleaded as a party, is no ground for re-opening the order of adjudication in the Insolvency Court in which the alienee was not given notice as the rule as it stood then did not require such notice. [Authorities discussed.]

K. Sankara Sastri for Petitioner.

T. C. A. Bhashyam, T. C. A. Tirumalachari and *Venkatavaradachari*, for Respondent.

K.S.

Koman, J. Venkata Narapu Reddi *v.* Chinna Konda Reddi.
23rd November, 1945. S. A. No. 2081 of 1944.

Deed—Sarikoru *document—Nature of—Mortgage or lease—Test.*

A document called *sarikoru* document recited that for discharging the debts due and for meeting family expenses, the executant borrowed Rs. 5,000 and for discharging the amount so borrowed, the lands mentioned in the schedule to the document were being conveyed to the promisee. It further recited that the executant would see to it that the lands would be continued in favour of the promisee until the above amount was discharged. In a suit for redemption of the land the promisee's successor in title contended that the deed was a lease and no suit for redemption would therefore lie.

Held, that the deed was a mortgage and not a lease.

Authorities reviewed and decision of Wadsworth, J., in S. A. No. 813 of 1936 relied on.

[Leave to appeal was granted.]

K. Subba Rao and *P. Rami Reddi* for Appellant.

V. Govindarajachari for Respondent.

K.S.

Kuppuswami Ayyar, J. Gomathinayagam Pillai, *In re.*
26th November, 1945. Cr. A. No. 584 of 1945.

Indian Penal Code (XLV of 1860), *section* 120-B—*Conspiracy to do an illegal act which is a crime—Mere agreement will be an offence without any act done in pursuance of the agreement.*

When a conspiracy is to do an illegal act which is a crime, then the agreement by itself will be sufficient to constitute an offence: it is only when the illegal act is no crime there will be the necessity for an act to be done in pursuance of the agreement to constitute an offence. Accordingly a mere conspiracy to set fire to Government buildings, police stations, public offices, etc., constitutes a crime and there is no necessity to prove any act done in pursuance of the agreement.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

[End of Volume.]